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No. 310

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, TRUSTEE; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

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The railroads appellees in the above-entitled case move to affirm on the ground that the questions presented on this appeal are so unsubstantial as not to need further argument.

STATEMENT.

Appellants' Jurisdictional Statement includes the jurisdictional basis for this action, the opinions below, and the statutes involved, and there appears to be no need to set them out in detail here. Briefly, this is an appeal in a statutory three-judge court action (28 U. S. C. § 1336) involving an order of the Interstate Commerce Commission (*Chicago B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I. C. C. 291). Appellants are four of some 27 plaintiffs in the court below, and were successful there in securing a judgment setting the Commission's order aside and remanding the cause to the Commission for further proceedings. *Boston & M. R. R.* v. *U. S.*, U. S. D. C. Mass., 162 F. Supp. 289 (April 28, 1958).

Although successful in securing vacation of the Commission's decision and return of the case to the Commission, appellants seek on this appeal to question the correctness of the District Court's rulings on certain contentions advanced by some of the plaintiffs below. The purported basis for appealing at this interim stage of the controversy is that the adverse rulings of the District Court may become *res judicata* as to the issues involved (Appellants' Jurisdictional Statement, pp. 3-4). The appellees filing this Motion to Affirm were intervening defendants in the lower court, and are cross-appellants in No. 322.

Appellants' Jurisdictional Statement lists five questions presented (pp. 4-5). Analysis of them shows that three issues are raised: First, whether the Commission had jurisdiction to entertain the form of proceeding here involved, i. e., a declaratory judgment action under Section 5(d) of the Administrative Procedure Act (5 U. S. C.

1004(d)) to settle a dispute among the railroads as to the reasonableness of certain freight car hire rates. Second, whether, if such jurisdiction exists, the Commission could render a declaratory ruling that certain stated amounts constituted the reasonable rates of compensation which car users should pay and car owners should receive, on a uniform basis, for the use of freight cars during specified periods, as distinguished from fixing merely the upper and lower limits of a "zone of reasonableness" of freight car rental within which car users might be free to offer less than the rate of compensation demanded by car owners. And third, whether the effort by the railroad appellees to secure through the Commission's processes a resolution of the controversy over freight car rental rates constituted, as to non-assenting railroads, a step in furtherance of a conspiracy in violation of the Sherman Act, to which the Commission should have refused to lend its aid. One of the appellants, the Long Island Railroad, disassociates itself from the Sherman Act contention (Jurisdictional Statement, footnote p. 3).

The context in which these questions arise is set out in the opinion below (162 F. Supp. 289, 291-4) and is summarized in the Jurisdictional Statement filed in No. 322. In short it is that when the rental rate for railroad-owned freight cars established and theretofore generally observed by the railroads was increased from $2 per day to $2.40 per day on August 1, 1953, certain railroads, including appellants, served notice on all other railroads, including appellees, that they would not pay the higher rate but would continue to pay the $2 rate, or something less. Appellee railroads, either as complainants or as supporting intervenors, instituted a proceeding before the Interstate Commerce Commission on September 21, 1953, asking for a declaratory ruling that the then current rate, and the two rates of $1.75 per day and $2.00 per day

which had preceded it, were just, reasonable and otherwise lawful compensation for the use by one railroad of a freight car owned by another railroad.

The Commission took jurisdiction, conducted hearings, heard argument, and issued a report in which it found and declared that the three car-hire rates were not in excess of reasonable compensation during the respective periods of their effectiveness, and that lower rates, in the opinion of the Commission, would not have been compensatory. 297 ICC 291, 308. In its rulings on the merits of the cost-finding and rate-making issues involved the Commission followed an earlier (1949) decision in a similar car-hire controversy between substantially the same groups of carriers. *Alabama T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 ICC 383.

The District Court considered at some length, and rejected, appellants' contention that the Commission had no statutory authority to entertain a declaratory judgment proceeding and to make findings of retroactive legal consequence concerning freight car rental rates. 162 F. Supp. 289, 295. The Court also, in two sentences, disposed of the argument that the Commission should have refused to entertain this proceeding because the instituting of it was an act in furtherance of an anti-trust conspiracy. 162 F. Supp. 289, 300. However on a certain issue relating to the formula or basis for computing car hire the Court ruled that the Commission had made inadequate findings, and on this ground set the Commission's order aside and remanded the case to the Commission for further proceedings. The cross-appeal in No. 322 brings into question the propriety of the District Court's action in setting the Commission's order aside.

ARGUMENT.

There Is No Substance to the Contention That the Commission Lacked Jurisdiction to Make the Declaratory Ruling Under Review.

Section 5(d) of the Administrative Procedure Act explicitly gives the Commission authority "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty" (5 U. S. C. § 1004(d)). Appellants attempt to avoid this plain language by contending that the Commission has only rule-making power, not adjudicative power, with respect to car hire, and hence cannot make a declaratory adjudication as to the reasonableness in the past of freight car rental rates. The necessary premise, and basic fallacy, of this argument is expressed in the second of the Questions Presented (Jurisdictional Statement, p. 5), and is that, absent any preexisting exercise of admitted rule-making power by the Commission, the Interstate Commerce Act does not impose as between railroads any obligation with respect to receiving or paying car-hire "(other than the obligation imposed by Section 1(4) with respect to the operation of through routes)."

Putting aside for the moment the quoted qualification, what appellants are saying is that unless the Commission has prescribed car hire rates under Section 1 (14)(a), the Interstate Commerce Act imposes no duty upon a railroad using a freight car owned by another railroad to pay reasonable compensation to the owner of the car for such use, and that since no duty in this regard exists under the statute, there is no basis for a complaint to the Commission by a car owner concerning a breach of such duty,

either to secure an award of damages or a declaratory ruling as to respective rights and liabilities. The Court below found no merit in this contention for the obvious reason that Congress, exercising Constitutional authority through Section 1(11) of the Act, among others, has required railroads to permit their freight cars to go off line and be used by other railroads in serving the public, and there can be no escape in this situation from an obligation on the part of the user to pay reasonable compensation to the owner for such use. *Chicago R. I. & P. Ry. Co.* v. *U. S.*, 284 U. S. 80, 96-7.

The qualification quoted earlier highlights the flaw in appellants' argument. As indicated above, appellants' denial of jurisdiction in the Commission to make a declaratory adjudication necessarily rests on the claim that, absent a prescription of freight car rental by the Commission, there is no duty on car users and car owners to pay and receive reasonable—and only reasonable—compensation for the use of freight cars. However, Section 1(4) of the Act* stands directly in the path of appellants' argument, for that section expressly imposes upon every rail-

* Section 1(4) of the Act (49 USC § 1(4)) is not quoted in appellants' jurisdictional statement. It is as follows:

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

road the affirmative and continuing duty to provide transportation on reasonable request; to establish reasonable through routes with other railroads, and reasonable rates applicable thereto; to provide reasonable facilities and regulations for operating such through routes, including "providing for reasonable compensation to those entitled thereto," and, where joint rates are in effect, providing for just and equitable divisions thereof. Thus, in the case of a through route there is no room for argument about the existence of a continuing obligation by one participating railroad to pay reasonable compensation to another participating railroad for facilities furnished and used in the performance of transportation service over such through route; and a breach of that obligation as between railroads gives rise to a claim for damages under the Act in the same way, and upon the same authority, that a breach of the railroads' duty to charge only reasonable rates to a shipper served on the through route would give rise to complaint by the shipper for an award of reparation.

It is for this reason that appellants must make an exception for Section 1(4) in claiming that no duty rests upon a car-using railroad under the Interstate Commerce Act to pay the owner reasonable compensation for the use of the car, and hence that the Commission had no jurisdiction in the present case. However, making the inescapable exception necessarily involves contending that Congress has permitted one railroad to appropriate and use the cars of another railroad without a reviewable and enforceable obligation to pay reasonable compensation to the owner, so long as the cars are not engaged in operating a through route to which the owner is a party. Appellants do not, of course, state the point so bluntly in their argument; indeed the allusion to it is most indirect (see Jurisdictional Statement, p. 20, footnote 13). Neverthe-

less, if appellants' argument were sound, the regulatory anomaly would inevitably be present that a railroad would be under a statutory duty to pay reasonable compensation for the use of a freight car when the user and the owner were parties to a through route existing expressly, impliedly or by prescription, but would be under no statutory duty to pay reasonable compensation to the owner for a car which the user appropriated and employed in local service on its own lines, or which it appropriated and used in joint service with other railroads so long as the car were kept out of a through route in which the owner participated.

It is unnecessary to examine this consequence of appellants' argument in the light of the constitutional limitations recognized in *Chicago, R. I. & P Ry. Co.* v. *U. S.*, 284 U. S. 80. As the Court below correctly held, Congress has plainly imposed upon all railroads the general obligation—applicable without regard to the existence of through routes—to provide adequate car service and to establish reasonable rules, regulations and practices with respect thereto (Sec. 1(11)). Since "car service" by definition (Section 1(10)) includes the supply, use, exchange, interchange and return of freight cars, the reasonable practices required of each railroad in connection therewith necessarily includes payment of reasonable compensation, and the exaction of no more than reasonable compensation, for the use of cars not owned by the user. From this conclusion it plainly follows, as the District Court held, that the Commission has authority under Section 13(1) and Section 16 to entertain complaints and award damages with respect to past car hire charges (162 F. Supp. 289, 295), and since the Commission's authority to make an adjudi-

cation is clear, there is no substance to the contention that the Commission lacked power in this proceeding to make the declaratory ruling requested of it.*

II.

There Is No Substance to the Contention That the Commission Could Not in the Exercise of Its Jurisdiction Find a Single Uniform Rate of Car Hire to Be Just and Reasonable Compensation in the Past as Between Car Owners and Users.

Appellants' second basic contention, expressed in the third and fourth Questions Presented (Jurisdictional Statement, p. 5) is that if a statutory duty has been prescribed with respect to paying and receiving car hire it does not extend beyond an obligation on the part of a car owner not to receive an unreasonably high rate, and an obligation on the part of the user not to pay an unreasonably low rate; and that the Act does not require, nor empower the Commission to require, uniform observance by owners and users of specified car-hire rates when not prescribed by the Commission in the exercise of its rule-making power. In other words, the argument is that the limit of the Commission's adjudicative power over past car hire is to fix a "zone of reasonableness" within which, presumably, car users may insist upon bargaining with car owners

* Although not determinative of the question, the Commission has for many years and in numerous instances ordered or authorized retroactive car hire settlements. E. g. *Owasco River Ry.*, 53 ICC 104, 113 (1919); *Valley and Siletz RR. Co.* v. *Sou. Pac. Co.*, 80 ICC 724, 731 (1923); *Lime Rock RR. Co.* v. *M. C. RR. Co.*, 102 ICC 48, 52 (1925). Moreover, in the 1949 Per Diem Case cited above, the Boston and Maine and the New Haven, appellants here, sought (along with a number of other complainants) an award of reparation on account of the past exaction from them of alleged unreasonable car hire charges, thereby invoking the jurisdiction which they now contend the Commission does not have. *Alabama T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 ICC 383, 384.

over car hire claims. This argument is given a Sherman Act coloration by weaving into it the contention that such latitude is necessary in order that there may be preserved to all railroads which are parties to the industry agreement for dealing with car service matters the "free and unrestrained right to take independent action" which is guaranteed by Section 5(a)(6) of the Interstate Commerce Act.*

The Commission rejected the contention that only a "zone of reasonableness" should be delineated on the ground that the concept is not compatible with fixing compensation for the use of property. (297 ICC 291, 307.) The District Court did not deal expressly with the point, but its discussion of the merits of the case indicates plainly an acceptance of the proposition that the form and manner in which car hire rates are to be fixed is a matter within the Commission's discretion, subject to appropriate judicial review. This is also clearly the tenor of *Chicago, R. I. & P. R. Co.* v. *U. S.*, 284 U. S. 80.

Moreover, appellants themselves demonstrate the unsubstantiality of the question presented by recognizing (Jurisdictional Statement, p. 21) that the Commission "in the exercise of its undoubted rule-making power" might find that relevant circumstances reasonably warranted the prescription of "a uniform rule for the calculation of car-hire applicable to all railroads." The argument that this result cannot follow where the car hire

* The procedures under which the railroads handle various matters relating to car service were approved by the Commission in 1950 in *Association of American Railroads—Agreement*, 277 ICC 413. One phase of the present controversy over car hire rates has been an attack by the Boston and Maine and the New Haven, among others, on the procedures by which the rates are established. With a modification not responsive to the attack of those two appellants the procedures were again approved by the Commission on March 7, 1957 (*Ahnapee & W. Ry. Co.* v. *Akron & B. B. R. Co.*, 302 ICC 265).

rates in controversy were established not by the Commission "but by private agreement of the owners of a majority of the freight cars" is plainly without merit since the Commission's authority to prescribe and to adjudicate arises from the same source in the statute, as the Court below correctly held.

III.

There Is No Substance to the Contention That the Commission Should Have Declined to Entertain This Proceeding.

The third issue tendered by appellants on this appeal is whether the Commission should have refused to exercise its jurisdiction on the ground that the proceeding before it was a step in furtherance of an anti-trust conspiracy by car owners to force non-assenting car users to pay car hire rates fixed by the car owners. The District Court rejected the contention summarily, saying "we are so little impressed by the argument that we see no need either to specifically refute it or even to state it in detail." (162 F. Supp. 289, 300.)

No more need be said here than to point out that the contention seems necessarily to rest upon the untenable assumption that the Commission has a different sort of jurisdiction over past car hire rates and practices than it has over such rates and practices for the future. As the District Court correctly held, the Act imposes continuing rights and duties upon the railroads concerning car service, and confers coextensive jurisdiction upon the Commission in connection therewith. A ruling by the Commission as to what was the reasonable car hire rate to be paid and received in the past has no different legal basis than a similar ruling of prospective application, insofar as it determines the rights and obligations of affected rail-

roads, assenting or not. It is wholly irrelevant that a past rate which the Commission is called upon to appraise originated through the industry's rate making procedures rather than by Commission prescription, or that some of the railroads subject to the rate (when and if approved by the Commission) withheld their assent from its original establishment. The important and relevant fact demonstrating the unsubstantiality of appellants' contention is that the agency whose processes the "car owners" were compelled to invoke for a review of the rates which the "car users" were refusing to pay was the one agency of government having primary jurisdiction of the subject matter and power through its decision to protect the "car users" from the price-fixing conspiracy charged to exist.

Conclusion.

We respectfully submit that the foregoing arguments show that the District Court ruled correctly on the questions sought to be presented on this appeal, and that the questions are so unsubstantial as not to need further argument. Accordingly we respectfully move that the rulings of the District Court upon which appellants have based their appeal be affirmed.

Respectfully submitted,

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